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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. [redacted]

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, and B. B. STEINER, Individually and As Co-Partners Doing Business As CUMBERLAND BATTERY MANUFACTURING COMPANY, and CUMBERLAND BATTERY MANUFACTURING COMPANY, a Partnership, *Petitioners,*

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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mere desire for cleanliness or personal hygiene. Those considerations apply to all industry, and time spent for such reasons is generally considered preliminary and postliminary to the actual working period. But the changing and bathing required of employees in a storage battery factory is occasioned by the poisonous substances used in the manufacturing process and is therefore an integral part of that process and should be considered a part of the days' work."

(R., 221a.)

The District Judge approached the solution of the problem from its *economic* viewpoint, saying:

"The manufacture of wet storage batteries is hazardous work and the expense of necessary precautions against such hazards *should be added* to the cost of the product and ultimately paid by those who use such batteries."

(R., 222a.)

OPINION OF THE UNITED STATES COURT OF APPEALS.

The Court of Appeals, speaking through District Judge Ford, rested its affirmance largely upon the premise that Section 5788.15 of the Tennessee Code required every employer to provide adequate and sanitary shower facilities when workers are exposed to excessive heat, or to skin contamination with infectious, irritating, or toxic material, and Section 6852 (d) of the Tennessee Code made lead poisoning an occupational disease compensable under the Tennessee Workmen's Compensation Law. The Court therefore concluded:

"Clothes changing and showering activities performed by defendants' employees are made necessary by the nature of the work performed by said employees. Such activities fulfill mutual obligations between said employees and defendants and directly benefit the defendants and their operations of their business. Said activities are so closely related to other duties performed by defendants' employees as to be an integral part thereof."

(Opinion, see Appendix.)

The learned Court of Appeals reached the conclusion that it was permissible for a court to convert clothes-changing and showering from "preliminary" and "postliminary" activities into a "principal" activity if it appeared that such preliminary and postliminary activities were hygienic or health measures on the basis of a statement by Senator Cooper on the Floor of the United States Senate in debate on the House Bill which amended the Fair Labor Standards Act (under the mistaken belief that Senator Cooper was speaking as the author of a Senate Bill), this statement being as follows:

"* * * We believe that in the use of the words 'principal activity' we have preserved to the employee the rights and benefits and the privileges which had been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity * * *" (93 Cong. Rec. 2297).

(Opinion, see Appendix.)

ARGUMENT.

1. The amendment to the Fair Labor Standards Act which Congress passed in 1947 and which is known as the "Portal-to-Portal Amendment" was the direct result of three decisions of this Court, they being:

Tennessee Coal, Iron & Railroad Co. v. *Muscoda Local 123 et al.*, 321 U. S. 590.

Jewell Ridge Coal Corp. v. *Local No. 6167*, 325 U. S. 161.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680.

Under the foregoing decisions this Court found that such preliminary activities as changing into working clothes, putting on aprons and overalls, removing shirts, sharpening tools, and other similar activities, and such postliminary activities as going to the bath house, taking shower baths, and other similar activities were clearly work falling within the definition found in the opinion of Mr. Justice Murphy in the Muscoda case, and hence "they constitute work that must be accorded appropriate compensation under the statute." Therefore the activities involved in the present case would have been compensable *prior* to the Portal-to-Portal amendment.

2. Thereupon Mr. Gwynne, a Congressman from Iowa, introduced House Bill 3157 in the House of Representatives. No Senate Bill was introduced, and it was House Bill 3157 which became the Portal-to-Portal Amendment to the Fair Labor Standards Act. Referring to the

three recent decisions of this Court, H. R. 3157, in stating the Congressional findings and declaration of policy, said:

> "The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act *as so interpreted* or claims arising *under such interpretation* were permitted to stand (1) the payment of such liability would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment and the earning power of employees; * * *."
>
> (Chap. 52, Sec. 1, 61 Stat. 84, May 14, 1947.)

Congress thereupon proceeded to deal with the matter, for the sole purpose of setting aside the result of this Court's decisions by (a) invalidating any existing claims accruing prior to May 14, 1947, and (b) amending the Fair Labor Standards Act so as to eliminate any such claims in the future.

Section 2 of the Portal-to-Portal Amendment invalidated all such existing claims excepting only activities which were compensable by either an express provision of a written or nonwritten contract in effect at the time of such activity between the employee and the employer or under a collective bargaining agreement, or in effect under a custom or practice at the establishment where the employee was employed (Chap. 52, Sec. 2, 61 Stat. 85).

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IN THE

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MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, and B. B. STEINER, Individually and As Co-Partners Doing Business As CUMBERLAND BATTERY MANUFACTURING COMPANY, and CUMBERLAND BATTERY MANUFACTURING COMPANY, a Partnership, *Petitioners,*

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COUPT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Morris Steiner and others, partners doing business as Cumberland Battery Manufacturing Company, for a writ of certiorari to review a judg-

ment of the United States Court of Appeals for the Sixth Circuit rendered in the above entitled cause which affirmed the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law, Opinion, and Judgment of the District Court appear in the Record at pages 212a-225a. The Opinion of the District Judge is reported in 111 F. Supp., at page 546. The Opinion of the Court of Appeals is not yet reported and is contained in the Appendix hereto.

JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are as follows:

(i) The date of the judgment or decree sought to be reviewed and the time of its entry was August 10, 1954.

(ii) A petition for rehearing was seasonably filed by petitioner, was considered by the Court, and the same was denied by an order entered on September 17, 1954.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by the writ of certiorari is 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

The questions presented for review involve interpretations of the provision of the Fair Labor Standards Act

of 1938 ((c) 676, 52 Stat. 1060; (c) 736, 63 Stat. 910, 29 U. S. C. Supp. V, 201, *et seq.*), as amended by the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. Supp. V, 251, *et seq.*) and the amendment of 1949 (63 Stat. 910-11). Specifically, three questions are presented:

1. Under the provisions of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, does time spent by petitioner's employees at its battery manufacturing plant in changing from street clothes into work clothes prior to punching the time clock at the beginning of the work day, and in taking shower baths and changing from work clothes to street clothes after punching out the time clock at the end of the work day, constitute compensable "time worked" under the amended Act?

2. Are the activities described in paragraph 1 above "preliminary" and "postliminary" activities and, if so, are they non-compensatory in the absence of a custom or practice at petitioner's establishment, or a written contract, making such activities compensatory?

3. Did the Congress, by the 1949 amendment to Sec. 3 (o) of the Fair Labor Standards Act intend to limit and restrict the provisions of Section 4 (a) of the Portal-to-Portal Act of 1947 (relating to future actions), as distinguished from Section 2 of the amendment (relating to claims pending or arising prior to the passage of the amendment), or should Section 4 (a) be construed the same as Section 2 of the Portal-to-Portal Act, insofar as the scope of the legislation is concerned?

STATUTES INVOLVED.

The provisions of the statutes involved (cited above) are lengthy and their pertinent text is set forth in the Appendix.

STATEMENT OF THE CASE.

Petitioners are engaged in the manufacture of batteries for automobiles at a plant located in Nashville, Tennessee. This action was instituted by Maurice J. Tobin, then Secretary of Labor, against petitioners by the filing of a complaint in the United States District Court for the Middle District of Tennessee, charging violations of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 as amended. The substance of the charges was that petitioners were employing workmen for work weeks longer than forty hours without the payment of additional overtime compensation and that petitioners failed to make, keep and prepare accurate records of the hours worked in excess of forty per week. The relief prayed for was a permanent injunction restraining petitioners from future violations. This was the basis for Federal jurisdiction in the Court of first instance.

Petitioners employed thirty to forty regular workmen who reported for work at 7:30 o'clock in the morning and ended the workday at 4:00 o'clock in the afternoon. At the time they began work, that is at 7:30 o'clock A. M., and at the time their work ended, that is 4:00 o'clock P. M., they punched a time clock (R. 25). The manufacturing process for storage batteries involves the handling

of toxic matter, such as sulphuric acid and lead oxide. This matter damages clothes if it is spilled on them. Petitioners operate a salvage business and laundry in a building adjacent to the storage battery plant (R. 50, 273) and, as a convenience to employees, petitioners furnished those desiring to change clothes before reporting for work with salvaged clothes that had been laundered. Petitioners did not require any employee to change clothes and some employees did not follow this procedure.

(R., 58-65a, 122-123a-217a, 225-229a, 259, 107a.)

The parties to the litigation entered into and filed the following stipulation of facts.

"Stipulation.

(Filed November 14, 1952.)

1. It is hereby stipulated and agreed by counsel, in open Court, that this case may be submitted to the Court for decision upon the certified record 'In the Matter of Morris Steiner *et al.*, d/b/a Cumberland Battery Manufacturing Company, P. C. -472, U. S. Department of Labor,' as supplemented by the depositions of not more than three expert witnesses called by each side. As two of its three witnesses the plaintiff agrees to call Dr. Miller Robinson and Eugene Plauche for the purpose of making them available for cross and re-direct examination.

2. It is agreed that defendants have never recorded the time spent by their employees in changing clothes in the morning, or in showering and changing clothes at night. Further, defendants have never considered this time as 'work' and have never paid for it. Employees, in many instances, have worked forty hours per week exclusive of such time.

3. Defendants have never issued any order, nor do they make any requirement requiring their plant employees to use the clothes-changing and showering facilities they make available. Most of the employees do regularly change from their street clothes to work clothes before reporting to their work places in the morning, and most of them do regularly take a shower in defendants' shower room and change back to street clothing after leaving their work places in the evening. Some employees do not follow this procedure.

These defendants make no requirement of any kind as to the type of clothes which are to be worn by their employees during work hours and the clothes or type of clothes which are worn by their employees is entirely optional with the employees.

In those instances where special equipment is required such as respirators, gloves, etc., defendants' employees are paid for the time taken in putting on such special equipment and in removing the same. This, however, is done during the work shift and as a practical matter and involves very little time.

4. The depositions of expert witnesses are to be taken within a three-weeks period from the date of this stipulation.

5. The brief of counsel for the plaintiff is to be filed with the Court within two weeks after the date of filing of the last deposition. Counsel for the defendants will file his brief within a week thereafter."

(R., 9a-10a.)

Those employees whose duties required them to constantly handle toxic matter were furnished masks (a sort of gas mask or respirator), aprons and gloves which pro-

tected them from the hazards of handling the matter. This certain or *special clothing* and equipment necessary to the employees' principal activity of manufacturing batteries was donned and taken off during the workday after the employee had punched the time clock in and before he had punched out and the employee was compensated for the time so spent.

(R., 220a, 264a, 67a, paragraph 3, Stipulation of Facts.)

The wearing of the scrap clothing did not enable the employee to more efficiently perform his duties in manufacturing batteries, but merely protected the employee's street clothing from damage from acids which might be spilled.

(R., 77a, 85a, 25a, 151a, 180a, 233a, 265a, 331a.)

No custom or practice, or collective bargaining agreement, existed which required petitioners to pay compensation for time spent in changing clothes and taking shower baths.

(Stipulation, paragraph 2, R., 9a, 13a, 168a, 258a.)

OPINION OF THE DISTRICT COURT.

The District Judge held that the time spent by employees in changing clothes and taking shower baths was compensable under the Fair Labor Standards Act, notwithstanding the Portal-to-Portal amendment. The basis of the Court's opinion adequately appears from the following quotation taken therefrom:

"The general requirement of bathing and clothes-changing in storage battery plants is not prompted by

Scores of reported decisions have upheld the validity, the purpose, and the effect of this legislation with respect to claims arising prior to May 14, 1947. Illustrative and typical is the case of *Bateman* v. *Ford Motor Co.*, which arose in the Sixth Circuit and which was heard by *five* District Judges—O'Brien, Leberle, Pickard, Koscinski, and Levin—76 Fed. Supp. 178.

District Judge Pickard, announcing the unanimous opinion of all five District Judges, said:

> "These two cases are representative of the deluge of Fair Labor Standards actions catapulted into our judicial tribunals by interpretations of the Supreme Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515."
>
> * * * * * * *
>
> "Congress, therefore, knowing the peril to be imminent, concluding that it could not await the usual turning of the wheels of justice, determined that the Court be relieved of the burden of 'excessive and needless litigation and champertous practices' and business relieved of a heavy burden of doubt. In remedy it amended the Fair Labor Standards Act by the Portal-to-Portal Act, B. L. 49, 80, Con., Ch. 52, 29 U. S. C. A., Secs. 201 *et seq.*, 251 *et seq.*, the main purpose of which was to limit employee's right to classify walking, *washing*, punching the clock, *changing clothes*, etc., 'as time worked' for which they were entitled to receive overtime compensation and liquidated damages unless such 'labor' was covered by * * *" a contract or a custom or practice, etc.
>
> 76 F. Supp., at page 180.

This *five Judge* unanimous decision was affirmed by the Circuit Court of Appeals for the Sixth Circuit on August 2, 1948 (169 F. 2d 266), and certiorari was denied by this Court on January 3, 1949 (335 U. S. 902).

The decisions have been uniform in construing Sec. 2 of the Portal-to-Portal Act as excluding from hours worked prior to May 14, 1947, preliminary activities such as clothes changing and taking shower baths. In the Sixth Circuit, for example, in *Lasater et al.* v. *Hercules Powder Co.*, decided December 6, 1948, 171 F. 2d 263, which involved clothes changing in order to manufacture TNT, the Court said:

> "But, as the District Court stated, the suit was based upon the Fair Labor Standards Act and not upon contract. The proof disclosed no express contract, written or non-written, and no custom or practice for payment of compensation for overtime which would bring appellant's claim within the exceptions set forth in the Portal-to-Portal Act. Since the activities of the employees had not been previously compensable by virtue of contract, custom, or practice, Sec. 2 of the Portal-to-Portal Act precludes all liability of the employer for payment of such overtime compensation."

On April 14, 1949, the Sixth Circuit Court of Appeals, in *Newsom et al.* v. *E. I. duPont*, 173 F. 2d 856, denied a claim arising under Sec. 2 of the Portal-to-Portal Act which involved preliminary and postliminary activities which the Court in its opinion described as follows:

> "At the end of every particular shift, it was necessary that plaintiffs remove grease, gloves, wrappings

and other special equipment and appliances, and in a great many instances they were required by the defendant's regulations to take a shower bath as a safety precaution for the benefit of the defendant."

In deciding the present case the Court of Appeals for the Sixth Circuit stated that its previous decisions in *Newsom* v. *E. I. duPont, supra,* and *Lasater* v. *Hercules Powder Co., supra,* were not applicable because the claims involved in those cases "arose under Sec. 2 of the Portal-to-Portal Act (29 U. S. C. A., Sec. 252) and the questions therein presented and decided are not here pertinent." (Opinion, p. 4.)

Thus the effect of the Court's holding was that postliminary and preliminary claims arising prior to May 14, 1947, and involved under Sec. 2 of the Portal-to-Portal Act were not necessarily excluded under Section 4 of the Portal-to-Portal Act which dealt with similar claims arising after May 14, 1947. *Petitioners insist that such conclusion is erroneous.*

Claims Arising After May 14, 1947, under Sec. 4 of the Portal-to-Portal Act.

It is believed that the present case is the first, and the only, reported decision of any Federal Court—District or Appellate—involving the activities of clothes-changing or bathing after May 14, 1947, where Section 4 of the Portal-to-Portal Amendment has been given an interpretation different from that uniformly given by the Courts to Section 2 of the Act relating to activities prior to May 14, 1947.

The pertinent provisions of Section 4 of the Portal-to-Portal Act are as follows:

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged on or after May 14, 1947—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time or any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract,

in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

(May 14, 1947, Ch. (c) 52, Sec. 4, 61 Stat. 86.)

At the time the foregoing amendment was passed the case of *McComb* v. *C. A. Swanson & Sons*, 77 F. Supp. 716, was pending in the District Court in Nebraska. Like the present case, it was a suit instituted by the Administrator of the Wage and Hour Division of the Federal Department of Labor, seeking to enjoin violations of the Fair Labor Standards Act based upon the decision of this Court rendered June 10, 1946, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. *Petitioners urgently insist that a reading of this decision will clearly indicate the error into which the Court of Appeals for the Sixth Circuit has fallen in the present case.*

The *Swanson* case involved clothes-changing activities made mandatory by the laws of Nebraska. *Upon the passage of the Portal-to-Portal Act, Swanson amended its answer so as to rely upon the amendment and thereupon the Administrator broadened the complaint so as to apply to activities occurring both before and subsequent to May 14, 1947.* This required the Court to pass upon and interpret the provisions of both Section 2 and Section 4 of the Amendment. The Court construed Section 4 as having the same legislative sweep and meaning as Section 2, the only difference being that Section 2 applied to activities prior to May 14, 1947, and Section 4 applied to the same type of activities subsequent to that date. The Administrator's action was accordingly dismissed, *and no appeal*

was prayed by the Administrator. The failure of the Administrator to appeal the decision, and the clear and cogent reasoning of District Judge Delehant quickly established that decision as the leading authority on the proper interpretation of Sections 2 and 4 of the Act, and, so far as a diligent search has revealed, no subsequent decision, District or Appellate, by any Federal Court has challenged the authority of the *Swanson* case in the proper interpretation of Section 4 of the Act until the decision in the present case. Further, in the present case, neither the District Judge nor the Court of Appeals referred to or commented upon the *Swanson* decision.

As stated, the *Swanson* case involved the preliminary activity of clothes-changing mandatorily required by both Federal and State laws and supervised by Federal inspection. In construing Section 4 of the Act the Court said:

> "Now the defining antecedent of the phrase 'principal activity or activities' in Section 254 (a) (2) appears in Section 254 (a) (1) in the language: 'The principal activity or activities which such employee is employed to perform.' Those words are not abstruse, obscure, or uncertain. They refer to the productive work in behalf of the employer which he hires the worker to do. For the machinist, it is the work at his bench or lathe; for the store clerk, the sale of goods; for the carpenter, the labor in the erection or repair of a building. And for the poultry eviscerator, it is the task to which he or she is assigned in the eviscerating room, be it the hanging of birds, decapitation, disemboweling, cleaning the rooms, or any one or more of the multitude of operations in the rooms serviced.
> * * *

" 'Preliminary' and 'postliminary' are not words of dubious, or recondite or confusing significance, even if the latter is not frequently employed. Derivatively, 'preliminary activities,' in the present setting are those activities which are engaged in before the threshold of, or the entrance upon, the day's principal activities."
(77 F. Supp., at 731-732.)

* * * * * * *

"Of 'postliminary' it need only be observed that it is the antonym of 'preliminary' and that it characterizes the activities after the close of the principal work of the day generally in the inverse order of their performance at its opening, including frequently washing the hands and face of the worker."
(77 F. Supp., at 733.)

The Court thereupon concluded that notwithstanding the changing of clothes and putting on of uniforms was required *as a health measure* by both Federal and State legislation, such activities were clearly preliminary and postliminary in character and therefore were not compensable in absence of a prevailing custom or practice, or a collective bargaining agreement requiring compensation therefor.

In point of time, the next case construing Section 4 of the Act was *Tobin* v. *King Packing Co.* (107 F. Supp. 369), decided by the District Court on May 27, 1952. The question in that case was whether or not the time spent by employees, called knifemen, in sharpening their knives outside their regularly scheduled shift time, was compensable or whether on the contrary such activity was preliminary or postliminary to the employees' principal activities and

thus excluded from compensation by Section 4 of the Portal-to-Portal Act. The District Judge held that such activities were preliminary and postliminary in character even though the sharpening of knives was directly related to and required by the nature of the principal activities engaged in, and therefore not compensable.

The Secretary of Labor appealed the case to the Court of Appeals for the Ninth Circuit, and that Circuit, on October 21, 1954, *affirmed* the decision of the District Court, the case being entitled *James P. Mitchell, Secretary of Labor, etc., Appellant, v. King Packing Company, Appellee*, No. 13540 (not yet officially reported).

On the appeal in the *King Packing Company* case, the Court of Appeals for the Ninth Circuit had before it the opinion of the Sixth Circuit which this petition seeks to have reviewed, and which was urged upon the Court as a precedent which should be followed in the *King* case. However, the Court of Appeals for the Ninth Circuit rejected the reasoning of the Sixth Circuit in the present case, and declined to follow the Sixth Circuit, thereby creating a sharp divergence of opinion between the Circuits in the proper interpretation of Section 4 of the Portal-to-Portal Act. The opinion of the Court of Appeals for the Ninth Circuit in the *King Packing Company* case will be found printed in the Appendix hereto.

After holding that the sharpening of knives prior to the beginning of the day's work was a "preliminary" activity and therefore excluded from compensable hours under Section 4 of the Portal-to-Portal Act, Orr, Circuit Judge, speaking for the Ninth Circuit, said:

"The Secretary argues that the sharpening of knives is not 'preliminary' or 'postliminary' but rather 'an integral part of a principal activity' since it is indispensable to the proper performance of the employee's work. He relies on a statement by Senator Cooper, one of the sponsors of the Portal-to-Portal Act, made during Senate debate on the bill that the term 'principal activities' is 'sufficiently broad to embrace within its term such activities as are indispensable to the performance of productive work.' The case of *Steiner et al.* v. *Mitchell*, 6th Cir., No. 11,934, decided August 10, 1954, supports this contention. In our view the term 'preliminary' or 'postliminary' cannot be interpreted so as to exclude all activity 'indispensable to the performance of productive work.' *To do so would deny effect to the intended meaning of the Portal-to-Portal Act.* All of the activities designated as 'preliminary' by the Supreme Court in the Mt. Clemens case can be considered indispensable. See *McComb* v. *C. A. Swanson & Sons*, D., Nebr., 1948, 77 F. Supp. 716, 733."

The case of *Ciemnoczolowski et al.* v. *Q. M. Ordnance Corp.* (119 F. Supp. 793) was decided by the District Court in Nebraska on March 24, 1954. The decision of the District Court was rendered after the oral argument in the present case and shortly before the Court of Appeals announced its decision in the present case. In the *Ciemnoczolowski* case the District Judge described the preliminary activities as follows:

"Each employee would enter his respective unit, *take off his clothes* and put them in a locker provided for that purpose. He would then proceed to another room in which he had a different locker containing

his *powder clothes*. He would put on his powder clothes, consisting of underwear, overalls, stockings, safety shoes and some type of hair covering, and then proceed out of the change house and to his respective position on the line where he performed his duties."

(119 F. Supp., at p. 799.)

The District Judge was careful to point out (footnote 4, 119 F. Supp. 800) the necessity for the special type of safety clothing:

"The explosive operators, who worked in buildings in the center portion of the line where the explosives were melted, poured and processed, *were required to wear powder clothes and take a shower at the end of the shift*. The other line operators were not."

In denying the claim for additional compensation the District Judge construed Section 4 of the Act and said:

"However, the evidence fails to convince the court that the employees ever engaged in the day's principal activity without receiving compensation therefor and there was no contract, custom or practice to pay the employees for preliminary activities engaged in before or postliminary activities engaged in after, the shift period."

In the discussion of the legal problem involved in the interpretation of Section 4 of the Act, the District Judge said:

"For an excellent discussion of the meaning of the terms 'preliminary,' 'postliminary' and 'principal,' as those terms modify the term 'activity' see the enlightening opinion of Judge Delehant in *McComb* v. *C. A. Swanson & Sons*, D. C. Nebr., 1948, 77 F. Supp. 716."

The *Ciemnoczolowski* case is now pending on appeal in the Court of Appeals for the Eighth Circuit.

The latest decision discussing the question here involved is that of the District Court for the Northern District of Georgia in the case of *Mitchell, Secretary of Labor, v. Southeastern Carbon Paper Co.*, decided August 17, 1954, and not yet officially reported, but published in 54 A. L. C. 1479. The activities involved in that case were the changing of clothes and the taking of shower baths before beginning work and after finishing work. The District Judge, construing Section 4 of the Act, held that such activities were not compensable, saying:

> "From all of the statements of legislators concerning this Act, and from its legislative history otherwise, it seems clear that Congress intended that the time expended by employees in washing and changing clothes should not be compensable, where it was not compensable under customs prevailing or under implied agreement between the parties, and where activities of the employees in changing clothes and taking baths, were not so closely related to the duties which they were employed to perform as to constitute an integral part thereof."

The District Judge considered the decision in the present case, which had just been announced, and distinguished the case under his consideration by stating that the present case involves changing clothes and taking shower baths "on account of the hazardous conditions inherent in the nature of their work," saying:

> "Those elements are not present in the instant case and it might be correctly ruled in the instant case

that the washing and changing clothes do not measure up to the rules laid down by the Supreme Court, prior to the passage of the Portal-to-Portal Act. Be that as it may, however, time consumed in washing and changing clothes, where not required by the employer and where done for the convenience of the employees, is not compensable where the employer and employees have tacitly agreed that it was not part of the work week, and that is the primary basis for decision in this case denying injunctive relief."

In the present case the parties *stipulated*, as follows:

"Defendants have never issued any order, nor do they make any requirement requiring their plant employees to use the clothes changing and showering facilities they make available."

(R., 10a.)

The *Southeastern Carbon Paper Co.* case was appealed and is now pending in the Court of Appeals for the Fifth Circuit.

The present case, therefore, represents the pioneer decision by any Federal Appellate Court on the construction of Section 4 of the Act, and the decision herein is contrary to every previously reported decision of the District Courts throughout the United States where the question has been considered, and is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Mitchell, Secretary, v. King Packing Co. (supra)*.

Legislative History.

The Court of Appeals in the present case based its adverse interpretation of Section 4 of the Act upon a state-

ment made by Senator Cooper of Kentucky while H. R. 3157 was under debate in the United States Senate. The learned Court of Appeals relied upon this rather general statement made by Senator Cooper, apparently under the mistaken belief that he was the *author* of a Senate Bill which was then under discussion. This Court has on many occasions cautioned against the use of casual statements from the floor in Congressional debates as an aid to the interpretation of a statute. For example, in the *Schwedmann Bros.* case (341 U. S. 384), the late Justice Jackson and Justice Minton concurring, said:

> "But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."

However, Senator Cooper, while supporting the legislation, was not the author of the bill, which came from the House of Representatives, where Congressman Gwynne was the author. In the interpretation of Section 4 of the Act, the debate by the author of the bill, made after the filing of the Conference Report, in Congress on May 1, 1947, *conclusively* demonstrates the erroneous conclusion of the learned Court of Appeals in its interpretation of Section 4 of the Act in the present case.

> "Mr. Michener: Mr. Speaker, I yield ten minutes to the gentleman from Iowa (Mr. Gwynne), *the author of this bill.*

* * * * * * *

"Mr. Gwynne, of Iowa: The next part of the bill has to do with portal-to-portal claims.

* * * * * * *

"This bill divides them up and provides that, one, riding, walking and traveling to the place of employment where the principal activity takes place and walking and traveling away from the place of the principal activity, or, two, preliminary activities to the principal activity and activities postliminary to the principal activities; as to those activities at the beginning and end of the day prior to the whistle, you might say, and subsequent to the whistle, *the same treatment is given as was given to existing portal-to-portal claims.* As to the main part of the working day, as to the principal activity for which any particular employee is employed, this law does not operate.

* * * * * * *

"Mr. Pace: It was not entirely clear to me on the portal-to-portal pay what was done with the future handling of those claims that *immediately precede* the moment of employment, not the walking and the riding, but the preliminaries to start work. What position did the Committee of Conference make of that type of claim?

"Mr. Gwynne, of Iowa: *That type of portal-to-portal claim is barred.* In existing claims, the entire thing is barred, even though the so-called portal-to-portal claim may arise *in the middle of the day*, during the hours for which the man is employed. In future claims this riding or walking or travel to principal place of employment is barred, and barred with it are preliminary activities and postliminary activities.

"Mr. Pace: Even though it involves the *laying out of work* the man is going to undertake in the next

few minutes, the laying out of garments to work on, that claim would be barred?

"Mr. Gwynne, of Iowa: It is barred *unless* there was an agreement or custom to pay for it.

"Mr. Pace: Does the gentleman think that should be handled through collective bargaining?

"Mr. Gwynne, of Iowa: No. The whole thought is that those claims are all barred. I mean as to existing claims as to activities for which the employer has not agreed to pay.

"Mr. Pace: I understand that, but I mean in the future; it is barred in the future unless there is an agreement between the employer and the employee?

"Mr. Gwynne, of Iowa: An *agreement or custom*" (Emphasis added).

93 *Congressional Record*, 4388-4389.

After the foregoing debate, Congressman Walter, one of the House conferees, in discussing the Conference Report (five weeks after Senator Cooper's statement on the floor of the Senate), made the following statements to the House of Representatives while it had under consideration House Bill 3157, *as amended by the Conference Report*:

"Mr. Walter: Mr. Speaker, I do not believe any conference report—at least there have not been many presented to this House for consideration—has received the care that was given this legislation.

* * * * * * *

"* * * If this report does not state the very clear ideas of the two bodies, then I do not think it is possible to state them in the English language.

* * * * * * *

"Mr. Speaker, the third point relates to the key words in Section 4 (a), namely, principal activity or activities. It is intended that these words shall be interpreted *with due regard to generally established compensation practices in the particular industry and trade.* The intent is that consideration must be given to such *prevailing compensation practices in determining what constitutes, or when any particular employee begins or ends his principal activity or activities.* In other words, the realities of industrial life, not arbitrary standards, are intended to be applied in defining the term 'principal activity or acitvities.' In this way we will avoid having another portal-to-portal situation in the future" (Emphasis added).

93 *Congressional Record*, p. 4389.

Thereupon, at the conclusion of the debate, Mr. Michener was careful to point out that the foregoing statements made by Congressmen Gwynne and Walter were made for the express purpose of clarifying the Congressional intent, and would be most helpful in arriving at the intent of the Congress. We quote this statement of Congressman Michener:

"Mr. Michener: Mr. Speaker, I have been in Congress a long time and I have never known a more prolonged, yet a diligent, conference on any legislation where there was disagreement between the two Houses. * * * The explanation of this compromise bill made in this debate by the gentleman from Iowa (*Mr. Gwynne*), the gentleman from Massachusetts (*Mr. Goodwin*), and the gentleman from Pennsylvania (*Mr. Walter*), all members of the Judiciary Committee, and the Conference Committee will be most helpful in arriving at the intent of the Congress. In fact,

their statements are brief when compared with the prepared statements of the conferees, and are most clarifying."

93 *Congressional Record*, p. 4390.

The 1949 Amendment to the Fair Labor Standards Act.

In 1949 Congress further amended the Fair Labor Standards Act by adding paragraph "(o)" to Section 3 of the Act, as follows:

"(o) Hours Worked. In determining for the purposes of Sections 6 and 7 the hours for which an employee is employed there shall be excluded any time spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee."

(63 Stat. 910-11.)

The learned Court of Appeals concluded that the above quoted amendment confirmed its interpretation of Section 4 of the 1947 amendment, saying:

"It is not difficult to perceive that this amendment was predicated upon recognition by Congress that, under some circumstances and conditions, changing clothes and washing may be part of compensable 'principal activities.' It affords impressive confirmation of the interpretation of the Act in accordance with its legislative history."

(Opinion, p. 4.)

The above amendment of 1949 originated with H. R. 3190 of the 81st Congress, First Session. This was a bill

by Mr. Lesinski, Chairman of the House Committee of Education and Labor. This bill did not contain Section 3(o). Mr. Lesinski's committee issued a committee report, No. 1267, to accompany the bill and, of course, it contained no reference to Section 3(o). Mr. Lucas from Texas introduced a bill on the same subject known as the Lucas bill and officially designated H. R. 4272. Then Mr. Herter introduced H. R. 4704 which provided in part as follows:

> "(n) Hours Worked.—In determining for the purposes of Sections 6 and 7 of the hours for which an employee is employed, there shall be excluded any time which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee."

As will be shown the Herter Bill was ultimately converted into Section 3(o) of the Act, as an amendment to the Lucas Bill during debate in the House.

* * * * * * *

> "Mr. Herter: Mr. Chairman, I offer an amendment.
>
> The Clerk read as follows:
>
> Amendment offered by Mr. Herter to the Lucas substitute: Page 6, After line 12, insert a new paragraph as follows:
>
> 3(o) Hours worked: In determining for the purposes of Sections 6 and 7 the hours for which an employee is employed, there shall be excluded any

time which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee.

Mr. Herter. Mr. Chairman, this amendment is an amendment to the definitions under the Act. *It is offered for the purpose of avoiding another series of incidents which led to the Portal-to-Portal legislation and led to the overtime-on-overtime legislation.*

At the present moment there is a twilight zone in the determinations of what constitutes hours of work which have been spelled out in many collective-bargaining agreements but have not necessarily been defined in the same ways.

Let me be specific. In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take on the clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.

The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, 'You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as part of the working day.' That situ-

ation may arise at any moment. *This amendment is offered merely to prevent such a situation arising* and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment.

Mr. McConnel: Mr. Chairman, will the gentleman yield?

Mr. Herter: I yield to the gentleman from Pennsylvania.

Mr. McConnel: May I say to the distinguished gentleman from Massachusetts that I favor his amendment as offered.

Mr. Herter: I appreciate what the gentleman has said.

Mr. Lucas: Mr. Chairman, will the gentleman yield?

Mr. Herter: I yield to the gentleman from Texas.

Mr. Lucas: I do not oppose the gentleman's amendment, *although I must say about it as I have said about the Cooper amendment that I do not think it is necessary. The Portal-to-Portal Act was intended to cover just such situations as the gentleman describes. However, if the gentleman insists upon reenacting certain provisions of the Portal-to-Portal Act in this bill, I can offer no objection.*

Mr. Herter: The Gentleman's interpretation of the Portal-to-Portal Act, I am afraid, may not be shared by others who fear that there may be a loophole here.* That is all I am trying to cover, to avoid the kind of misunderstanding that arose before.

*The "loophole" referred to by Mr. Herter on August 10, 1949, and which his amendment sought to cure is fully discussed in *Galvin* v. *National Biscuit Co.*, 82 F. Supp. 535. In this case there was an express contract calling for 15 minute clothes changing time. The proof, however, showed additional time was being spent by the employees and the suit was to secure pay for this additional time. The additional pay was denied.

Mr. Lucas: It is my understanding that both the unions and management desire this amendment.

Mr. Herter: So I understand.

The Chairman: The question is on the amendment offered by the gentleman from Massachusetts.

The amendment was agreed to."

Congressional Record—House, August 10, 1949, page 11,433.

Therefore, when the House Bill went to the Senate it contained the Herter amendment. Mr. Thomas, Chairman of the Committee on Labor and Public Welfare, introduced Senate Bill 653. This Senate Bill was substantially the same as the 2nd Lesinski Bill in the House and did not contain Section 3 (o) and, of course, the Conference Report contained no discussion of the subject matter in Section 3 (o). Apparently very little significance was attached to Section 3 (o) and Senator Ives prepared a draft which appears on the Congressional Record for August 22, 1949, at page 12,109 stating that neither the Lesinski Bill nor the Lucas Bill nor the Senate Bill 553 modify the Portal-to-Portal Act.

The Senate Bill was then amended and adopted with some variations and a Conference was had which issued Conference Report 1453 of the 81st Congress, 1st Session. This Conference Report describes Section 3 (o) as follows:

"Hours Worked.—The House bill in Section 3 (o) *added a partial definition* of the term 'hours worked.' The Senate amendment did not contain an amendment on this subject. The conference agreement adopts the House provisions with an amendment. Under the section as passed by the House, for the purposes of the

minimum wage and maximum hours provisions of the act, there would be excluded from 'hours worked' any time spent by the employee which was excluded from measured working time under a *bona fide* collective-bargaining conference agreement applicable to him or custom or practice thereunder. The conference agreement limits this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday."

The Conference Committee included Section 3 (o) in the Conference Bill which was ultimately passed and the following is the only further debate that took place on Section 3 (o) which occurred in the House:

Mr. Herter: The gentleman knows that I was very much interested in protecting the sanctity of collective-bargaining agreements entered into in good faith in determining working time by employees, and offered an amendment in order to clarify that situation. I notice that the conferees have amended that amendment in a way that is entirely unobjectionable to me, but I also notice on page 16 of the report, in discussing amendment made, the words "hours worked," are used a number of times and are put in quotation marks.

In view of the fact that Sections 6 and 7 of the bill to which the definition would apply never contained the particular words, "hours worked," I am wondering whether those quotation marks have any special significance.

Mr. McConnell: They have no special significance except it is a referral to the term that was used in the report itself. There are no quotation marks around the "hours worked" in the report. These were put in the statement because they refer to the term in the report.

Mr. Herter: I gather then that is merely a reference to a heading that appears at the beginning of the explanation?

Congressional Record—House October 18, 1949, page 15,130.

Rather than confirming the interpretation given by the learned Court of Appeals to Section 4 of the Act, it would seem that the amendment of 1949, generally referred to as Section 3 (o), serves better to illustrate the *fundamental error* in the Court's conclusion. In the present case the Court held in substance that preliminary and postliminary activities, such as changing clothes and taking shower baths, if "so closely related to other duties performed by defendants' employees as to be an integral part thereof" lose the character of preliminary and postliminary activities and, notwithstanding the time element, become *principal activities*. If this interpretation is given to the Act then under the 1949 amendment a portion of the principal activities of employees may be rendered non-compensable by custom or practice or under a collective bargaining agreement, since the 1949 amendment expressly provides:

> "In determining for the purposes of Sections 6 and 7 the hours for which an employee is employed, there shall be excluded *any time spent in changing clothes or washing at the beginning or end of each workday* which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective bargaining agreement applicable to the particular employee."

Surely Congress did not intend to permit compensable principal activities to be divided up or included or ex-

cluded by contracts between the employer and the employees, or by the changing customs and practice at the establishment in question.

In the light of the entire judicial and legislative history following the decision of this Court in the *Mt. Clemens Pottery* case, it would seem more reasonable that the 1949 amendment be construed as referring to *all* clothes changing and *all* washing "at the beginning or end of each work day" irrespective of the *relationship* or the *reasons* for such clothes changing and washing. It would seem that by the amendment of 1949 Congress has designated clothes changing and the taking of shower baths as *statutory preliminary and postliminary activities* which are excluded from working hours under Section 4 of the 1947 amendment but which *may be included* as compensable time by custom or practice at the establishment, or under the terms of a *bona fide* collective bargaining agreement.

Reasons Relied On for the Allowance of the Writ.

It would seem incontrovertible that the present case presents a situation under which the writ should be granted under Rule 19, for the following reasons:

(1) The opinion for the learned Court of Appeals for the Sixth Circuit in the present case, interpreting an important provision of the Fair Labor Standards Act, is in direct conflict with the decision of another Court of Appeals on the same matter, towit—the decision of the Court of Appeals for the Ninth Circuit in the case of *Tobin (now Mitchell)* v. *King Packing Co.*, decided October 21, 1954, not yet reported, see opinion printed in the Appendix hereto.

(2) In the present case the learned Court of Appeals for the Sixth Circuit has decided an important question of

Federal law which has not been, but should be, settled by this Court.

(3) In the present case the learned Court of Appeals for the Sixth Circuit has decided an important Federal question which has affirmed and sanctioned a departure from the usual course of judicial proceeding by a lower court so as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals numbered and entitled on its docket No. 11934, Morris Steiner, Harry Lightman, Mitchell Magid, and B. B. Steiner, individually and as co-partners doing business as Cumberland Battery Manufacturing Company, and Cumberland Battery Manufacturing Company, a partnership, Appellants, vs. James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 20 day of November, 1954.

CECIL SIMS,

Attorney for Petitioner.

NOTE: Italics, wherever they appear, have been added by Petitioner, unless otherwise indicated.

Statutory Provisions Involved.

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. Supp. V, 201 *et seq.*):

DEFINITIONS

SEC. 3. As used in this Act—

* * * * * * *

(o) Hours worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such pe-

riods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251 *et seq.*:

* * * * * * *

SEC. 2.

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * * * *

SEC. 4.

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 11934.

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID and B. B. STEINER, individually and as co-partners doing business as CUMBERLAND BATTERY MANUFACTURING COMPANY, and CUMBERLAND BATTERY MANUFACTURING COMPANY, a partnership, *Appellants*,

v.

JAMES P. MITCHELL, Secretary of Labor, United States Dept. of Labor, *Appellee*.

Appeal from the District Court of the United States for the Middle District of Tennessee.

Decided August 10, 1954.

Before Simons, Chief Judge, Allen, Circuit Judge, and Ford, District Judge.

Ford, District Judge. The Secretary of Labor, in his capacity as Administrator of the Wage and Hour Division of the United States Department of Labor, instituted this action to enjoin the appellants from violating the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938 as amended, 29 U. S. C. A. §215a-1,

a-2, a-5. This appeal is from the judgment of the District Court granting the injunction.

Appellants are engaged in manufacturing automotive type wet storage batteries which they sell in interstate commerce. In their manufacturing operations at their plant at Nashville, Tennessee, appellants regularly employ from thirty to forty workmen. It is undisputed that the manufacturing process in which appellants' employees are engaged requires the use of various chemicals and chemical compounds, including sulphuric acid, lead metal, lead oxide, lead sulphate and lead peroxide, which create conditions which are dangerous to the health of the workers.

Before beginning their productive work in the morning, most of appellants' employees change from their street clothes into work clothes provided for them by the appellants, and when their productive labor is discontinued in the evening they remove the work clothes, take a shower bath and put on their street clothes. The changing of clothes and showering are activities which take place at the plant, and the work clothes for such changing and facilities for such showering are provided by the appellants.

The only question presented for determination is whether the activities of the employees of appellants in changing clothes and taking shower baths at the plant, on account of the hazardous conditions inherent in the nature of their work, are so closely related to the duties which they are employed to perform as to constitute an integral part thereof and should be classed as "principal" rather than "preliminary" and "postliminary" activities

within the meaning of Section 4(a)(2) of the Portal-to-Portal Act of 1947, 61 Stat. 84-87, 29 U. S. C. A., §254(a)(2), which is as follows:

> "(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act. . . .
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

The use of the phrase "principal activity or activities" in the Statute suggests that the word "principal" in some situations, may apply to more than a single type of activity, but, in view of the great variety of industrial conditions, and various types of industries throughout the nation, it was obviously not practicable for the area embraced by the words "principal activity or activities" to be precisely defined or marked out. The scope or reach of the phrase was left to be measured by the facts and circumstances involved in each industry.

For aid in determining the intent and purpose of Congress in the use of the words "principal activity or activities," it seems appropriate to resort to the legislative history of the Act. "When aid to construction of the meaning of words as used in the statute is available there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination." *United States* v. *American Trucking Associations, Inc., et al.*, 310 U. S. 534, 543-4; *Harrison, Collector of Internal Revenue* v. *Northern Trust Co.*, 317 U. S. 476, 479.

"It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwedmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 394-5.

In the Conference Report upon the Portal-to-Portal Act presented by Representative Gwynn in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), it is said that the language of Section 4 of the Act, here in question, follows that of the Senate Bill. In the Report of the Senate Committee it is stated that the term "principal activities" includes all activities which are an integral part of a principal activity, two examples of which are set out in the report. In explaining the term "principal activities," Senator Cooper, one of the members of the Committee which reported the Senate Bill, and one of its sponsors, stated:

> ". . . We believe that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part

of the principal activity, indispensable to its performance, must be included in the concept of principal activity. . . . (93 Cong. Rec. 2297).".

Moreover "It is settled that subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Great Northern Ry.* v. *United States*, 315 U. S. 262, 277; *Sarlls* v. *United States*, 152 U. S. 570, 576.

By the "Fair Labor Standards amendments of 1949," 63 Stat. 910-11, Congress added paragraph "o" to Section 3 of the Act as follows:

> "(o). Hours Worked. In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

It is not difficult to perceive that this amendment was predicated upon recognition by Congress that, under some circumstances and conditions, changing clothes and washing may be part of compensable "principal activities." It affords impressive confirmation of the interpretation of the Act in accordance with its above legislative history.

The authorities relied upon by appellants are not apposite to the questions here presented: *Newsom* v. *E. I. duPont de Nemours & Co.*, 173 F. 2d 856, and *Lasater* v. *Hercules Powder Co.*, 171 F. 2d 263, both decided by this

Court, arose under Section 2 of the Portal-to-Portal Act (29 U. S. C. A., §252), and the questions therein presented and decided are not here pertinent.

None of the other cases cited dealt with activities made necessary by imminent dangers to the health of employees which arose out of and were inherent in the nature of the work for which they were employed.

Upon the evidence presented bearing upon the material issues, the District Court found the facts as follows:

> "The use of sulphuric acid involves the probability of deteriorating the clothing and, in some cases, of burning the skin of those who have occasion to handle it. The deterioration of clothing renders the employee more susceptible to contamination of his skin and body by particles of lead and lead compounds.
>
> Pure lead metal and the various lead compounds which are used in the manufacture of automotive-type wet storage batteries are materials which are toxic to human beings. Regular exposure to atmosphere containing as much as 1.5 milligrams of lead per 100 cubic meters is regarded by the medical profession as a hazardous exposure with the attendant possibility of lead intoxication or lead poisoning. There is no proof as to the lead concentration in the air in defendants' plant.
>
> Storage battery manufacture is recognized by experts as one of the most hazardous of the lead-using industries due to the fact that it necessarily involves dusty processes in which the concentration of lead in the atmosphere is almost impossible to control within absolutely safe limits.

Clothes-changing and showering practices in the storage battery industry are a recognized part of industrial hygiene programs designed to reduce the hazards of lead poisoning to such manufacturing employees.

Section 5788.15, Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, a law establishing an industrial hygiene division or service as a part of the Tennessee state department of public health, provides in part as follows:

> '. . . that every employer shall provide adequate and sanitary shower facilities when the workers are exposed to excessive heat, or to skin contamination with infectious, irritating, or toxic materials.'

Defendants are covered by the Tennessee Workmen's Compensation Act (Secs. 6851-6901 Williams Tennessee Code Annotated, 1950 Cumulative Pocket Supplement), Section 6852(d) thereof providing that lead poisoning is an occupational disease made compensable by statute. Defendants carry insurance, an alternative requirement under Section 6895 of the statute, to protect against liability under this law.

During the period since January 25, 1950, most of defendants' employees have customarily changed clothes in a locker room (equipped with separate lockers for work and street clothing) provided by defendants before reporting to their places of work in the plant. Defendants customarily furnish scrap clothing which their employees are free to use, if they choose, during working hours. Most of defendants' employees have customarily showered at defendants' plant after completing their manufacturing duties and have then changed back to their street clothing before leaving defendants' premises. In no

instance has time spent by defendants' employees in changing clothes in the morning and in the evening or in showering at the plant in the evening been regarded by the defendants as time worked by their employees, nor has it ever been recorded as such. Said employees have never been compensated for the time so spent. Defendants' employees customarily work as many as forty (40) hours per week exclusive of time spent in clothes-changing and showering.

Although it has been stipulated that the defendants have never issued any order nor made any formal requirement that their plant employees use the clothes-changing and showering facilities provided by the defendants, the defendants' insurance carrier would not accept the insurance risk if defendants refused to provide showering and clothes-changing facilities for their employees. Such facilities, having been furnished, were intended to be used. From time to time defendants' plant superintendent, with immediate supervision over the employees and representing the defendants in relation to their employees, instructed the employees to change clothes and shower on defendants' premises and most of defendants' employees, understanding the instructions to represent the wishes of the defendants, obeyed.

The furnishing, by defendants, of clothes-changing and showering facilities, and the use of such facilities by defendants' employees, have the effect of reducing and controlling the defendants' potential legal liabilities, enable the defendants to comply with the direct requirements of state law and the indirect requirements of their insurer, and contribute to the continued and uninterrupted operation of the defendants' business by promoting the health of defendants' employees.

Although none of defendants' employees has been found to have lead poisoning during the period covered by the complaint, abnormal concentrations of lead have been discovered in the bodies of some of defendants' employees and defendants' insurance doctor has recommended that such employees be segregated from their customary duties.

The possibility and danger of skin burns and deterioration of clothing with the attendant loss of protective cover, resulting from the use of sulphuric acid renders the showering and clothes-changing activities performed by defendants' employees an essential part of the performance of their duties.

The hazard of lead poisoning resulting from the regular contact of defendants' employees with lead and lead compounds renders the showering and clothes-changing activities performed by defendants' employees necessary and indispensable to the performance of their duties.

Clothes-changing and showering activities performed by defendants' employees are made necessary by the nature of the work performed by said employees. Such activities fulfill mutual obligations between said employees and defendants and directly benefit the defendants and their operation of their business. Said activities are so closely related to other duties performed by defendants' employees as to be an integral part thereof."

The major part of the testimony upon which the findings of the District Court rest consisted of a certified record of testimony taken at a hearing before the U. S. Department of Labor, supplemented by depositions, and on that account the findings of the District Court are deprived of the degree of finality which would otherwise attach

under Rule 52, *Seagrave Corp.* v. *Mount*, 212 F. 2d 389, 394, C. A. 6. We are of the opinion, however, that the Court's findings are amply supported by the evidence and should not be disturbed.

That changing of clothes and taking of shower baths at the time and in the manner herein described are regular practices which are recognized as essential safeguards against the serious occupational hazards to which appellants' employees are daily subjected in the performance of their duties is sufficient to render them an integral and indispensable part of the principal activities which they are employed to perform, within the meaning of the Portal-to-Portal Act, and time spent in such activities is time worked within the meaning of the Fair Labor Standards Act, as amended.

The judgment of the District Court should be and is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 13,540.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Appellant,

vs.

KING PACKING COMPANY, a Corporation,
Appellee.

Oct. 21, 1954

Appeal from the United States District Court for the District of Idaho, Northern Division.

Before: ORR and POPE, Circuit Judges, and YANKWICH, District Judge.

ORR, Circuit Judge:

King Packing Company, a corporation, hereafter King Packing, operates a meat packing plant near Nampa, Idaho. It employs twelve or fourteen knifemen on its killing floor and nine or ten in the cutting room. These employees are employed on a regular eight-hour shift, five

days a week, with an hour off at noon and a five minute rest period both morning and afternoon. The men are compensated at hourly rates. Certain of the knives used by the men are furnished by King Packing. All other knives used by each employee are owned and furnished by him. This is a requirement incident to employment. It is a rule at the plant and a custom and usage in force there that the men sharpen their own knives outside the scheduled shift of eight hours and for this activity the men are not compensated. While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make it impracticable to do so during shift hours. A room for sharpening, in which there is an emery wheel and grindstone, is furnished by King Packing. In order to keep the edge on the blade throughout the shift the men frequently steel their knives. This operation, which is a distinct process from sharpening with whetstone, emery wheel and grindstone, is performed on company time and compensated for.

The Secretary of Labor brought an action in the District Court seeking to enjoin King Packing from alleged violations of the Fair Labor Standards Act. His complaint is bottomed on the failure to compensate for knife sharpening. King Packing contends that this time is not required to be recorded or paid for because of the provisions of Section 4 of the Portal-to-Portal Act of 1947 regarding "preliminary" or "postliminary" activities. A solution of the question posed requires a determination of

whether the knife sharpening operations performed by the employees before starting or after concluding the regular eight-hour shift were "preliminary" or "postliminary" to the principal activity or activities performed by the men. The relevant portions of the controlling statutory provision, § 4 of the Portal-to-Portal Act, are set forth in note 1.[1]

The Supreme Court of the United States, in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692-

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[1]Section 4 of the Portal-to-Portal Act of 1947, 29 U. S. C. A., §251, etc., so far as here relevant, provides as follows:

"Sec. 4.

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective bargaining representative and his employer."

93, gave examples of various activities which it termed "preliminary." One of these examples was "assembling and sharpening tools," an identical activity with which we are concerned in the instant case. The Portal-to-Portal Act was passed by Congress subsequent to the decision in the Mt. Clemens case with the purpose in mind, among other things, of making non-compensable certain preliminary activities, which the Mt. Clemens case had held to be compensable. See Part I of the Portal-to-Portal Act of 1947, Findings and Policy; H. R. Rep. No. 71, 80th Congress, 1st Session (1947). Sections 2 and 3 of the Act deal with then existing claims which particularly prompted its enactment, while section 4 deals with future claims such as those involved in the instant case. If our conclusion that Congress enacted the Portal-to-Portal Act for the purpose of making non-compensable certain activities held to be compensable in the Mt. Clemens case, and in so doing, used the term "preliminary" in the same sense that the Supreme Court of the United States used it, is valid, then "assembling and sharpening of tools" is a "preliminary" activity. Knives used in the King packing plant are tools and knives were what the employees were sharpening.

The Secretary argues that the sharpening of knives is not "preliminary" or "postliminary" but rather "an integral part of a principal activity," since it is indispensable to the proper performance of the employees' work. He relies on a statement by Senator Cooper, one of the sponsors of the Portal-to-Portal Act, made during Senate debate on the bill that the term "principal activities" is "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of

productive work." The case of *Steiner et al.* v. *Mitchell*, 6 Cir., No. 11,934, decided August 10, 1954, supports this contention. In our view the terms "preliminary" or "postliminary" cannot be interpreted so as to exclude all activity "indispensable to the performance of productive work." To do so would deny effect to the intended meaning of the Portal-to-Portal Act. All of the activities designated as "preliminary" by the Supreme Court in the Mt. Clemens case can be considered indispensable. See *McComb* v. *C. A. Swanson & Sons*, D. Nebr., 1948, 77 F. Supp. 716, 733.

While, as we have said, section 4 of the Act is the controlling provision in this case, we have found it helpful in our construction of the meaning and intent of section 4 to consider cases which deal with section 2, although section 2, unlike section 4, does not explicitly refer to preliminary activities. Section 2 has been construed as referring to the activities involved in the Mt. Clemens case. In deciding cases under section 2 the courts have had occasion to describe various activities as principal or as preliminary. In support of his contention that the knife sharpening involved in the instant case is a principal activity the Secretary relies on several of these cases.[2] These cases are distinguishable. The activities treated as principal in these cases were the same or very similar to ac-

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[2] *Biggs* v. *Joshua Hendy Corp.*, 9 Cir., 1950, 183 F. 2d 515;
United States Steel Co v. *Burkett*, 4 Cir., 1951, 192 F. 2d 489, 491;
F. W. Stock & Sons v. *Thompson*, 6 Cir., 1952, 194 F. 2d 493;
Central Missouri Tel. Co. v. *Conwell*, 8 Cir., 1948, 170 F. 2d 641;
Glenn L. Martin Nebraska Co. v. *Culkin*, 8 Cir., 1952, 197 F. 2d 981.

tivities which the employees performed throughout their working day.

Other cases arising under section 2 describe as preliminary the activities involved in the instant case, namely, the sharpening of knives used in a meat packing plant. *Market* v. *Swift & Co.*, 2 Cir., 1949, 173 F. 2d 517, 520; *Smith* v. *Cudahy Packing Co.*, D. Minn., 1947, 76 F. Supp. 575. The activities described as preliminary in still other cases are analogous to those here involved.[3]

The Secretary argues that there is in effect in the instant case an express provision of a written contract which prevents the employer from being relieved of liability under section 4. He relies upon the following provision in the collective-bargaining agreement in effect between King Packing and the Union. "All time worked over and above [eight hours a day and forty hours a week] shall be time and one-half." Section 2 as well as section 4 provides that an employer shall not be relieved of liability for activities made compensable by an express provision of a written contract. In so doing section 2 employs language identical to that used in section 4. In support of his contention that an express provision prevents the employer from being relieved of liability in the instant case, the Secretary relies on two cases arising under section 2: *Joshua Hendy Corp.* v. *Mills*, 9 Cir., 1948, 169 F. 2d 898; *Frank* v. *Wilson & Co.*, 7 Cir., 1949, 172 F. 2d 712, cert. de-

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[3] *Bauler* v. *Pressed Steel Car Co.*, 7 Cir., 1950, 182 F. 2d 357 (cleaning of firearms by guards);
Plummer v. *Minneapolis-Moline Power Implement Co.*, D. Minn., 1948, 76 F. Supp. 745 (same);
Rolé v. *J. Niels Lumber Co.*, D. Montana, 1947, 74 F. Supp. 812 (caring for tools used in logging operations).

nied 337 U. S. 918. Each of these cases is distinguishable. In the first an employee was required to attend to his regular duties during his so-called lunch period. In the second the contract provided for time and one-half compensation for "employees who are required to work over eight hours in any one day," and certain employees were required to be "punched in" five minutes before the regular shift time for which they were compensated.

At the time the contract providing compensation for "all time worked" was entered into by King Packing and the Union it was the custom and practice at the plant that time spent in sharpening knives was not compensated. This existing custom should be considered in interpreting the intent of the parties in employing general language as to "time worked." The custom in effect at the plant that time spent in knife-sharpening was non-compensable was continued after the execution of the contract without complaint on the part of the Union. In construing an agreement it is useful to consider the interpretation placed upon it by the parties. The continuation of the existing custom without complaint is most conclusive that the parties in the use of general language as to payment for overtime were referring to work performed outside the eight-hour shift but of the same character as the work usually performed within the regular shift.

Judgment affirmed.

(Endorsed:) Opinion. Filed Oct. 21, 1954.

Paul P. O'Brien, Clerk.